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No. 92-800

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

NATIONAL AGRICULTURAL
CHEMICALS ASSOCIATION,

Petitioner,

v.

KATHLEEN E. LES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Date: January 8, 1993

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NATIONAL AGRICULTURAL
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**On Petition for Writ of Certiorari to
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for the Ninth Circuit**

MOTION FOR LEAVE TO FILE BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the Petition for a Writ of Certiorari. Counsel for Petitioner has consented to the filing of this brief, as have counsel for the United States and counsel for some of the Respondents. WLF has telephoned and written to counsel for the other Respondents but has been unable to obtain written consent from them. Accordingly, this motion is necessary.

WLF is a nonprofit public interest law and policy center with more than 100,000 members and supporters

nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to advancing the interests of the free-enterprise system. To that end, WLF has appeared on numerous occasions as *amicus curiae* before the United States Supreme Court as well as other federal and state courts in cases where environmental and public health concerns need to be balanced with steps necessary to maintain a healthy free-enterprise system. *See, e.g., Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991).

WLF has also been involved on many occasions in litigation involving the proper role of the judiciary in our American system of government. WLF has repeatedly argued in courts at all levels that the judiciary -- as the one unelected branch of government -- should be mindful of its limited role in public policy making. *See, e.g., Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990).

WLF recognizes the importance of ensuring that pesticides used in agricultural production do not end up jeopardizing the safety of the nation's food supply. At the same time, WLF also recognizes that pesticides have played an important role -- and must continue to play an important role -- in ensuring the availability of abundant and wholesome food supplies. WLF believes that EPA in this case has struck a proper balance between these two concerns. Moreover, now that EPA has struck that balance -- and has done so in a manner that is not inconsistent with its mandate from Congress -- the courts should be extremely reluctant to second-guess EPA's decision.

WLF believes that its brief may be of assistance to the Court in deciding the issues raised in this Petition. WLF brings to this case a perspective that differs from that of any of the parties. It has no financial and/or administrative stake in the outcome of this action; it is

filing solely out of a desire to assist the Court in arriving at a proper resolution of the issues raised.

For all the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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January 8, 1992

QUESTION PRESENTED

Does the United States Environmental Protection Agency have authority to establish a "*de minimis*" exception to § 409(c)(3)(A) of the Federal Food, Drug, and Cosmetic Act (the "food additive Delaney Clause") to allow use of agricultural pesticides which are carcinogenic in laboratory animals, but pose virtually no risk of cancer to consumers of processed foods?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICUS CURIAE* 1

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION . . . 4

I. PROPER RESPECT FOR THE ROLE OF ADMINISTRATIVE BODIES IN OUR SYSTEM OF GOVERNMENT REQUIRES THAT EPA'S DECISION BE AFFIRMED . . . 5

II. EPA EMPLOYED PROPER TECHNIQUES OF STATUTORY CONSTRUCTION IN ANALYZING THE FOOD ADDITIVE DELANEY CLAUSE 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases:

Alabama Power Co. v. Costle, 636 F.2d 323 (D.C. Cir. 1979) 6
Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) . . . . . *passim*
Pauley v. Bethenergy Mines, Inc., 111 S. Ct. 2524 (1991) 6
Public Citizen v. Young, 831 F.2d 1108 (D.C. Cir. 1987) 6-8
Rust v. Sullivan, 111 S. Ct. 1759 (1991) 10
Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 112 S. Ct. 2447 (1992) 7-8
Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991) 12

Statutes:

Federal Food, Drug, and Cosmetic Act
§ 402(a)(2)(C), 21 U.S.C. § 342(a)(2)(C) 13
§ 408, 21 U.S.C. § 346a 13
§ 409(c)(3)(A), 21 U.S.C. § 348(c)(3)(A) . *passim*
§ 512(d)(1)(H), 21 U.S.C. § 360b(d)(1)(H) . . . 7
§ 706(b)(5)(B), 21 U.S.C. § 376(b)(5)(B) 7

Miscellaneous:

56 Fed. Reg. 7750-7775 (Feb. 15, 1991) . 3, 8, 11, 13

National Research Council, *Regulating Pesticides in Food: The Delaney Paradox* (National Academy Press 1987) 13

G. Nager, *The Supreme Court's 1991 Term: Binding Law by Bureaucracy* (Washington Legal Foundation 1991) 6

Page

L. Silberman, *Chevron -- The Intersection of Law and Policy*, 58 Geo. Wash. L. Rev. 821 (1990) . 10

C. Sunstein, *Law and Administration after Chevron*, 90 Colum. L. Rev. 2071 (1990) 9-10

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation are set out fully in the motion for leave to file accompanying this brief.

PRELIMINARY STATEMENT

Striking the proper balance between, on the one hand, minimizing health risks caused by use of pesticides on our nation's food supply and, on the other hand, ensuring the availability of abundant and wholesome food supplies through the use of pesticides, is an extremely complex task. Congress has addressed that issue in numerous statutes adopted over the past half century.

Nonetheless, given the complexity of the subject matter, it is understandable that Congress has been unable to anticipate and address directly every issue that has arisen in the course of America's effort to achieve the proper balance between the goals cited above. Accordingly, it has been the task of a variety of federal administrative bodies to address the issues not directly addressed by Congress. For example, Congress was silent regarding whether the food additive Delaney Clause in § 409 of the Federal Food, Drug and Cosmetic Act ("FFDCA"), 21 U.S.C. § 348, should include a *de minimis* exception such that the presence of pesticides posing trivial cancer risks would not thereby be forbidden in processed foods. Confronted with that silence, EPA (the agency charged with regulating the presence of pesticides in processed foods) responded by announcing that it would interpret the Delaney Clause as including a *de minimis* exception.

Respondents were unhappy with that decision and asked the court below to overturn it; they persuaded the lower court that EPA has no authority to create a *de minimis* exception. Respondents' argument and the lower court's decision misperceive the role of the executive branch in our system of government. The passage of time inevitably discloses gaps in all legislation, and this Court has made clear that it *is* the role of administrators to attempt to fill those gaps. The courts are not authorized to second-guess those attempts when, as here, an administrator's action is reasonable and is not directly contrary to Congress's expressed intent.

If Respondents were unhappy with EPA's decision, they should have asked Congress to overturn the decision through new legislation. But they should not be permitted to invoke the aid of the courts to refight an issue that they lost in the democratically elected branches of government. The Court should grant the Petition for a Writ of Certiorari in order to correct this unwarranted judicial intrusion into the affairs of the executive branch. WLF's

brief focuses on why it is that EPA's decision is entitled to deference and leaves to others a more detailed accounting of the language and legislative history of the food additive Delaney Clause.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement of the Case contained in the Petition for a Writ of Certiorari.

In brief, Respondents in 1989 petitioned EPA to revoke 14 food additive regulations covering seven pesticides; Respondents argued that since EPA had determined that the pesticides were animal carcinogens, the regulations violated the food additive Delaney Clause.[1] EPA granted the petition as to the pesticides dicofol and DDVP; denied the petition as to the pesticide phosmet (because EPA had not definitively determined whether phosmet is a carcinogen); denied the petition as to the pesticide mancozeb (because there is an ongoing Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") proceeding that is addressing regulations concerning the presence of mancozeb in processed foods); and denied the petition as to the pesticides benomyl and trifluralin (because EPA determined that its regulations concerning use of those pesticides result in residues (on processed foods) that pose a *de minimis* cancer risk). *See* 56 Fed. Reg. 7750 (Feb. 25, 1991).[2]

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[1] Before issuing a food additive regulation covering a pesticide, EPA is required by the FFDCA to determine that use of the pesticide "will be safe." FFDCA § 409(c)(3)(A), 21 U.S.C. § 348(c)(3)(A). The food additive Delaney Clause modifies the general safety provision as follows: "no additive shall be deemed to be safe if it is found to induce cancer when ingested by man or animal, or if it is found, after tests which are appropriate for the evaluation of the safety of food additives, to induce cancer in man or animal." *Id.*

[2] EPA did not rule on the petition as to the pesticide chlordimeform, because EPA had previously revoked chlordimeform's food additive regulations. *Id.*

Respondents filed a petition in the United States Court of Appeals for the Ninth Circuit on April 15, 1991, challenging EPA's refusal to revoke benomyl, trifluralin, phosmet, and mancozeb regulations. They contended that EPA's action violates the FFDCA's food additive Delaney Clause. Specifically, they contended that the food additive Delaney Clause decrees that there is no "safe" level of a pesticide on processed food once that pesticide has been shown to pose a cancer risk -- no matter how slight the risk.

In a July 8, 1992 decision, the Ninth Circuit granted the petition and set aside EPA's order declining to revoke regulations for the four pesticides at issue. Petition Appendix (Pet. App.) 1a-12a (reported at 968 F.2d 985 (9th Cir. 1992)). The Ninth Circuit held that EPA exceeded its authority in interpreting the food additive Delaney Clause as containing an exception for pesticides that pose a *de minimis* cancer risk. The National Agricultural Chemicals Association (NACA), which had intervened in the Ninth Circuit in support of EPA's order, subsequently filed a Petition for a Writ of Certiorari, seeking review of the Ninth Circuit's decision.

REASONS FOR GRANTING THE PETITION

This case raises an issue of exceptional importance -- the safety of our nation's food supply. Top-ranking EPA officials have acknowledged that the Ninth Circuit's decision -- if allowed to stand -- will have "far-reaching and dramatic impacts on pesticide use in this country" and could result in increased cancer risk to consumers if the pesticides at issue in this case are replaced by approved pesticides that are significantly more carcinogenic. Pet. 12-13.

This case also raises important issues regarding the proper role of the courts in our system of government. Indeed, the crucial nature of the public health issues raised in this case provide particularly compelling grounds for

judicial reluctance to second-guess the views of those government officials assigned the task of safeguarding public health.

Policy choices such as whether to permit pesticides posing trivial cancer risks to be present on processed foods are most appropriately made by the political branches of government. In the absence of a clear directive from Congress on such issues, it up to the executive branch -- not the courts -- to make the required choices. EPA made just such a policy choice in this case when it determined that the food additive Delaney Clause is subject to a *de minimis* exception. It makes no difference whether the courts agree with EPA's policy choice or even whether they believe that Congress would have made the same choice had Congress directly addressed the issue; rather, a proper understanding of the respective roles of the three branches of our government requires that EPA's policy choice be upheld so long as it is a reasonable choice. EPA has demonstrated that its policy choice not only is reasonable but also makes the most sense out of the sometimes-conflicting mass of federal pesticide statutes.

The Ninth Circuit's rejection of EPA's policy choice was founded on its rejection of EPA's argument that the food additive Delaney Clause contains a *de minimis* exception. That decision is contrary to this Court's decisions regarding *de minimis* exceptions and directly conflicts with the reasoning of a decision of the United States Court of Appeals for the District of Columbia Circuit in a case involving a closely analogous statute.

I. PROPER RESPECT FOR THE ROLE OF ADMINISTRATIVE BODIES IN OUR SYSTEM OF GOVERNMENT REQUIRES THAT EPA'S DECISION BE AFFIRMED

Since issuing its landmark decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court has repeatedly made clear its commitment to limited judicial review of an administrative

agency's implementation of statutes which the agency is charged with implementing. That commitment "reflects a sensitivity to the proper roles of the political and judicial branches." *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991). As the Court noted in *Chevron*, "[F]ederal judges -- who have no constituency -- have a duty to respect legitimate policy choices made by those who do." *Chevron*, 467 U.S. at 866.

Chevron mandates that courts undertake a two-step process when reviewing agency action that involves interpretation of a federal law which the agency is charged with implementing. First, if Congress has told the agency what to do about the "precise" question at issue through a clear command in a law, the agency must do what Congress has told it to do. *Id.* at 842-43. If not, the court must simply determine whether the agency's interpretation is a reasonable one and, if so, be bound by it. *Id.* at 843. The reviewing court is so bound even if it "would have reached [another result] if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. *Chevron* thus vests federal agencies with the power authoritatively to decide what the law is and to create binding interpretations -- and an aggrieved party may be denied all recourse in a court of law. *See* G. Nager, *The Supreme Court's 1991 Term: Binding Law by Bureaucracy* (Washington Legal Foundation 1991).

Chevron dictates that EPA's interpretation of the food additive Delaney Clause be upheld in this case. At issue is whether EPA acted properly in determining that the food additive Delaney Clause contains a *de minimis* exception. The language of the clause is silent regarding whether such an exception exists. Prior to the decision below, the federal courts were generally in agreement that in the absence of strong evidence to the contrary, it can legitimately be inferred that a statute is subject to a *de minimis* exception. *See Public Citizen v. Young*, 831 F.2d 1108, 1113 (D.C. Cir. 1987); *Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979) ("Unless Congress has been extraordinarily rigid, there is likely a

basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value"). There is no evidence that Congress contemplated "extraordinarily rigid" application of the food additive Delaney Clause, and (applying the second prong of the *Chevron* test) EPA's interpretation of the clause as containing a *de minimis* exception is "reasonable" -- particularly in light of the judicial presumption in favor of such exceptions.

The Ninth Circuit's decision relied on *Public Citizen*, in which the D.C. Circuit ruled that the color additive Delaney Clause, § 706(b)(5)(B) of the FFDCA, 21 U.S.C. § 376(b)(5)(B), is not subject to a *de minimis* exception. Pet. App. 7a.[3] *Public Citizen* provides no support for the decision below and in fact directly conflicts with that decision.

Public Citizen held that a statute should be presumed to provide for a *de minimis* exception in the absence of evidence that Congress has been extraordinarily rigid in adopting the statute.[4] *Public Citizen* found that the color

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[3] There are three anti-cancer "Delaney Clauses" in the FFDCA. The one at issue in *Public Citizen* was the color additive Delaney Clause. At issue in the instant case is the food additive Delaney Clause. The third Delaney Clause (21 U.S.C. § 360b(d)(1)(H)) deals with animal food and drugs. As the D.C. Circuit noted in *Public Citizen*, the three Delaney Clauses "differ slightly in language, *more materially in statutory context and legislative history.*" *Public Citizen*, 831 F.2d at 1109 (emphasis added).

[4] This Court's decision in *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447 (1992), is similar. Rejecting an argument that recognition of a *de minimis* exception to a statute violates the maxim that the plain language of a statute ought to control its interpretation, the Court said that the argument:

> [I]gnores the fact that the venerable maxim *de minimis non curat lex* ("the law cares not for trifles") is part of the established background of legal principles *against which all enactments are adopted*, and which all enactments (absent

(continued...)

additive Delaney Clause is not subject to a *de minimis* exception only after finding that Congress had exhibited such rigidity in adopting that particular clause in 1960. *Public Citizen*, 831 F.2d at 1113-17. Given that the *Public Citizen* court looked exclusively at the color additive Delaney Clause's statutory context and legislative history (and not to the clause's wording) in discerning such rigidity, *Public Citizen* does not support Respondents' contention that the similarity in language between the two Delaney Clauses requires a finding that Congress was displaying similar rigidity when it adopted the food additive Delaney Clause in 1958. Indeed, the *Public Citizen* court stressed repeatedly that "the food additive Delaney Clause raise[d] complex issues distinct" from those in *Public Citizen* (*id.* at 1118 n.13) and that its decision should not be viewed as foreordaining a similar interpretation of the food additive Delaney Clause. *Id.* at 1119-20.

In the final order that is the subject of Respondents' challenge, EPA discussed at great length both the statutory context and the legislative history of the food additive Delaney Clause. That discussion (which will not be repeated here) demonstrated that Congress did not clearly express a rigid intent that the clause not be subject to a *de minimis* exception. *See* 56 Fed. Reg. 7758-73. In the absence of a clear expression of such Congressional intent, *Public Citizen* and *Chevron* mandate that this Court defer to EPA's reasonable interpretation of the clause.[5]

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[4] (...continued)
contrary indications) are deemed to accept.

Wisconsin Department of Revenue at 2457.

[5] In at least one respect, Respondents in the court below seriously misconstrued EPA's rationale for its decision: Respondents stated that "EPA argues that a rigid rule against carcinogens need no longer be followed because that rule was based on the state of scientific knowledge in 1958, not 1991." Respondents' Ninth Circuit Brief at 21. EPA has not in these proceedings characterized the food additive (continued...)

The Ninth Circuit noted that EPA's current interpretation of the food additive Delaney Clause differs from previous federal government interpretations of the clause. Pet. App. 9a. Such switches in an agency's interpretation of a statute in no way lessen the deference owed to the agency's current interpretation by virtue of *Chevron*. As the Supreme Court reiterated in a recent decision:

> This Court has rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretation" of the statute in question. *Chevron*, 467 U.S., at 862. In *Chevron*, we held that a revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.*, at 863-864. An agency is not required to establish rules of conduct to last forever.

Rust v. Sullivan, 111 S. Ct. 1759, 1769 (1991). *See also*, C. Sunstein, *Law and Administration after Chevron*, 90

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[5] (...continued)
Delaney Clause as "a rigid rule against carcinogens." Moreover, the Ninth Circuit (Pet. App. 8a) missed the import of the advances in scientific knowledge between 1958 and 1991. Scientists who testified before Congress regarding the 1958 food additives amendment did not oppose establishing safe dosage levels for carcinogenic food additives because they believed that there was no such thing as a safe dosage of such food additives; rather, they did so because they recognized that scientific knowledge in 1958 was such that scientists were incapable of determining safe dosage levels. 56 Fed. Reg. 7769-70. Nothing in the legislative history of the food additive Delaney Clause suggests that Congress in 1958 intended to prohibit *de minimis* levels of carcinogenic food additives even after scientific knowledge had advanced to the point that scientists could accurately determine what constitutes a *de minimis* level.

Colum. L. Rev. 2071, 2103 (1990) ("Under *Chevron*, agency views receive deference not because they capture a unitary intended meaning, but because the resolution of statutory ambiguities should be undertaken by accountable, specialized administrators, not by courts").

The Ninth Circuit not only declined to defer to EPA's interpretation of the food additive Delaney Clause but actually claimed to be deferring to the prior, contrary federal government interpretations. Pet. App. 9a ("As a contemporaneous agency construction of the statute, [the prior] interpretation is entitled to great weight"). The Ninth Circuit's decision to accord greater weight to a 1958 federal agency interpretation of the food additive Delaney Clause than to EPA's current interpretation is in direct conflict with *Chevron*.

The decision in this case will have enormous consequences for the future of food production in this country; moreover, the proper role of pesticides in food production is a politically divisive issue. The practical and political significance of this case underscores the advisability of courts being reluctant to overturn an agency's interpretation of a statute it is charged with implementing. As Judge Lawrence Silberman has pointed out, "The agencies -- even the independent ones -- have superior political standing to the life-tenured federal judiciary in performing that policy making function." Silberman, *Chevron -- The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 823 (1990). WLF believes that a Congressional intent to create a *de minimis* exception to the food additive Delaney Clause can fairly be implied from the clause's statutory framework and legislative history; but even if a court believes otherwise, *Chevron* dictates that EPA's interpretation of the clause be upheld in the absence of evidence of a clear directive from Congress that no such exception is permissible. The Court should grant the Petition in order to correct the Ninth Circuit's improper intrusion into the realm of policy-making.

II. EPA EMPLOYED PROPER TECHNIQUES OF STATUTORY CONSTRUCTION IN ANALYZING THE FOOD ADDITIVE DELANEY CLAUSE

Respondents contended below (and the Ninth Circuit concurred) that EPA arrived at its conclusions concerning the meaning of the food additive Delaney Clause by use of faulty statutory construction techniques. Several of the points raised by Respondents and the Ninth Circuit in this regard merit response.

First, Respondents contended that the effect of EPA's construction of the food additive Delaney Clause is to write that clause out of the FFDCA; Respondents contended that that construction violates a "fundamental rule of statutory construction" by "failing to give effect to every word Congress used." Resp.'s Ninth Circuit Brief at 17. That objection is without merit. In the absence of the Delaney Clause, the FFDCA would permit any level of a carcinogenic pesticide in processed food that EPA considered to be "safe"; EPA's current interpretation of the food additive Delaney Clause condones the presence of carcinogenic pesticides in pesticides only where the risk posed by such pesticides is trivial or *de minimis*. That potentially is a far tougher standard than a mere "safe" standard. In the context of this case, EPA has interpreted a "trivial" risk as a risk of less than one additional cancer case for every one million people every 70 years. *See* 56 Fed. Reg. at 7755-58. That EPA's interpretation of the food additive Delaney Clause does not write the clause out of the FFDCA is underscored by EPA's granting of Respondents' request that it revoke food additive regulations relating to the pesticides dicofol and DDVP. EPA revoked those regulations because it had received inadequate assurances that the cancer risks posed by dicofol and DDVP were *de minimis*; EPA did so despite evidence that those cancer risks were extremely small. *See* 56 Fed. Reg. at 7774-75.

Second, Respondents argued and the Ninth Circuit held that various post-1958 actions undertaken by Congress

constituted congressional ratification of a zero-tolerance interpretation of the food additive Delaney Clause. Resp.'s Ninth Circuit Brief at 23-33; Pet. App. 9a. WLF takes issue with the conclusions drawn by Respondents regarding the various post-1958 actions they cited[6] and further notes the skepticism with which recent Supreme Court decisions have greeted any and all attempts to discern the meaning of a statute from post-enactment congressional conduct. *See, e.g., Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2487-91 (1991)(Scalia, J., concurring in the judgment).

Moreover, the Ninth Circuit's and Respondents' entire discussion of post-enactment congressional conduct fails to take account of the strict demands of *Chevron*. In order to overturn EPA's decision, the Ninth Circuit is required by *Chevron* to do more than cite snippets of legislative history that, when taken together, make out a plausible case for its interpretation of the food additive Delaney Clause. Rather, the Ninth Circuit must show that EPA's interpretation of the clause is contrary to a clear congressional directive. *Chevron*, 467 U.S. at 842-43. Rarely, if ever (and certainly not in this case), could

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[6] For example, Respondents contended that Congress's 1977 adoption of legislation providing an exception for saccharin from the requirements of § 409 of the FFDCA (in order to allow the continued use of saccharin as a food additive despite its known carcinogenic qualities) demonstrates that Congress viewed the food additive Delaney Clause as a zero-tolerance provision that did not incorporate a *de minimis* exception. Resp.'s Ninth Circuit Brief at 31-33. WLF takes issue with Respondents' view of history. Indeed, as Respondents themselves concede (*id.* at 31), the FDA in 1977 was preparing to ban saccharin based primarily on the general safety requirement of § 409; accordingly, if the 1977 Congress had believed that the food additive Delaney Clause contained a *de minimis* exception (or, as is more likely, if Congress in 1977 never gave any thought one way or the other to whether a *de minimis* exception existed), it could only have overturned the FDA's proposed action by acting as it did, *i.e.*, by adopting legislation that granted an exception for saccharin from the requirements of § 409 of the FFDCA. Therefore, Congress's adoption of the saccharin exception sheds no light on Congress's views regarding the *de minimis* exception issue.

evidence of post-enactment congressional conduct supply the clear congressional directive required by *Chevron*.

Finally, the Ninth Circuit's decision fails to come to grips with the "Delaney Paradox" described at length by EPA in its order. The Ninth Circuit's interpretation of the food additive Delaney Clause would mean that: (1) Congress intended a zero tolerance for carcinogenic pesticides in processed foods even though they are tolerated on *raw* foods under § 408 of the FFDCA, 21 U.S.C. § 346a; and (2) because pesticide residues on processed foods are acceptable (under § 402(a)(2)(C) of the FFDCA, 21 U.S.C. § 342(a)(2)(C)) if they do not exceed residue levels tolerated on raw foods, Congress intended applicability of the zero-tolerance food additive Delaney Clause to depend solely on whether the pesticide in question tends to increase in concentration during processing. *See* 56 Fed. Reg. 7751-52.

There simply is no scientific basis for distinguishing among carcinogenic pesticides based on whether the pesticides concentrate during food processing; there is no correlation between the tendency of a pesticide to concentrate during food processing and the risk it poses to humans, and thus enforcement of the food additive Delaney Clause on a zero-tolerance basis could lead to increased use of less-safe pesticides simply because they do not tend to concentrate during food processing. *Id.*[7] Accepted rules of statutory construction weigh against ascribing such an irrational intent to Congress in adopting the food additive Delaney Clause. Much of the

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[7] Moreover, ascribing a strict, zero-tolerance meaning to the food additive Delaney Clause would do little to reduce the quantity of carcinogenic pesticides in the typical American's diet. One study concluded that pesticides currently tolerated on processed foods whose use would be affected by zero-tolerance enforcement of the food additive Delaney Clause account for no more than 20% of the typical American's cancer risk arising due to the presence of carcinogenic pesticides on food. National Research Council, *Regulating Pesticides in Food: The Delaney Paradox* at 5 (National Academy Press 1987).

inconsistency among federal statutes governing pesticides is eliminated if the food additive Delaney Clause is determined to include a *de minimis* exception.

In sum, EPA's determination that the food additive Delaney Clause includes a *de minimis* exception is the most natural reading of that clause, taking into account the language of the clause, its legislative history, and its statutory framework. When one adds to that conclusion *Chevron*'s directives, the case for upholding EPA's determination is overwhelming. The Court should grant the Petition in order to overturn the Ninth Circuit's significant departure from accepted rules of statutory construction.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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